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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

CHARLES HOGARTY,

Plaintiff,

v.

NEC CORPORATION OF AMERICA, ET AL.

Defendants.

Case No. 3:08-cv-00677-DMS-BLM
Class Action

JOINT MOTION FOR APPROVAL
OF SETTLEMENT AND
DISMISSAL OF CLASS ACTION
COMPLAINT

The Honorable Dana M. Sabraw
Magistrate Judge Barbara L. Major

I. INTRODUCTION

Plaintiff Charles Hogarty ("Plaintiff") and defendants NEC Corporation of America ("NEC"), Dynamic Staffing, Inc. ("Dynamic"), and Innovative Employee Solutions, Inc. ("Innovative") (collectively referred to as "Defendants") jointly seek approval of their Proposed Settlement ("Proposed Settlement") of Plaintiff's individual claims and the concurrent dismissal of the above-captioned class action Complaint. Plaintiff has settled his claims against

1 Defendants for a confidential sum. A copy of the written agreement containing the terms of the
2 Proposed Settlement is submitted contemporaneously herewith to the Chambers of the Hon.
3 Dana M. Sabraw. The Proposed Settlement resolves all of the named Plaintiff's wage and hour
4 claims against Defendants arising under state and federal law.

5
6 The Proposed Settlement is reasonable and appropriate, and satisfies all of the criteria for
7 approval under federal law. The Proposed Settlement adequately compensates Mr. Hogarty for
8 his individual claims, and none of the putative class members have elected to opt into this class
9 action to date. Moreover, the Proposed Settlement obviates the need for a class-wide settlement,
10 as the putative class members' rights are unaffected thereby. Accordingly, the parties jointly
11 request that the Court approve the Proposed Settlement and order the dismissal of the class
12 action Complaint.

13 II. STATEMENT OF FACTS

14
15 After the filing of the Complaint, the parties conducted due diligence by exchanging
16 information in order to investigate the facts of this case, and to ascertain the applicable law.
17 Such exchanges of information showed that Mr. Hogarty was employed by Dynamic and
18 Innovative, and provided services to NEC in its Herndon, Virginia offices, beginning in late
19 2005 and ending in approximately early July, 2007.

20
21 As required by Chambers Rule 6.A, counsel for NEC contacted Mr. Hogarty's counsel
22 about a potential motion to transfer this case to the U.S. District Court for the Eastern District of
23 Virginia, the district in which Mr. Hogarty provided services to NEC. NEC's counsel informed
24 Mr. Hogarty's counsel that its due diligence investigation of the facts showed that Mr. Hogarty
25 had never worked in California, and was the only Installation Supervisor in NEC's Herndon
26 offices employed by Innovative and Dynamic. Because the work was performed at NEC's place
27 of business in Virginia, which has no independent state overtime law, the parties determined that
28

1 a Rule 23(b) opt-out class would not be available, leaving only the “opt in” representative action
2 contemplated by Section 16(b) of the Fair Labor Standards Act, 29 U.S.C. § 216(b). Because Mr.
3 Hogarty was the only Installation Supervisor, the parties determined that collective action
4 treatment under 29 U.S.C. § 216(d) was not appropriate.

5
6 Through additional exchanges of information in advance of the Early Neutral Evaluation
7 held before Magistrate Judge Major on July 17, 2008 (“ENE”), counsel for the parties
8 determined that it was unclear precisely how many hours of unpaid overtime Mr. Hogarty had
9 worked in the relevant time period. Also, counsel for Defendants raised several defenses to
10 Mr. Hogarty’s claims.

11 Having conducted reasonable inquiries into the facts and applicable law, the parties
12 entered into the Proposed Settlement at the ENE. In light of all of the circumstances, including
13 the disputed factual and legal issues, the parties believe that the Proposed Settlement is a fair and
14 equitable resolution of Mr. Hogarty’s claims, and that dismissal of the entire complaint,
15 including the allegations with respect to a Rule 23 class action or a Section 216(d) collective
16 action, is now appropriate.

17 18 **III. APPLICABLE LAW**

19 The Proposed Settlement is fair and the compensation offered is adequate given Mr.
20 Hogarty’s individual damages and the potential for recovery thereof. Moreover, since the rights
21 of the putative class members will not be adversely affected by the Proposed Settlement and
22 dismissal of this lawsuit, the Court is empowered to approve the settlement and dismiss
23 Plaintiff’s Complaint.

A. THE SETTLEMENT IS FAIR

All parties concur that, under the circumstances of this case, the Proposed Settlement represents a fair and equitable compromise of Mr. Hogarty's claims in light of the disputed factual and legal issues.¹

B. NOTICE TO THE PROPOSED CLASS IS NOT REQUIRED

As set forth above, there is no potential class of Installation Supervisors because Mr. Hogarty was the only Installation Supervisor referred to NEC by Dynamic and Innovative.

Even if there were a potential class, there would be no requirement that notice of the Proposed Settlement be given to any potential class members. Such notice is required only in cases where a proposed settlement affects the rights of absent class members. As indicated above, the Proposed Settlement and requested dismissal have no impact on any rights of potential class members. Class notice has not been sent to any potential class members under Rule 23, and no potential class members have filed a consent to "opt-in" to this suit under Section 216(d).

The mere filing of this Complaint and the inclusion of class allegations relating to alleged FLSA violations within it has no binding affect on the putative class members unless and until they file written consents with the court. (*Kinney Shoe Corp. v. Vorhes*, 564 F.2d 859, 862 (9th Cir. 1977)), *overruled on other grounds*. Indeed, the filing of a consent to participate in a FLSA action is a jurisdictional matter. "[A] member of the class who is not named in the complaint is not a party unless he affirmatively 'opts in' by filing a written consent-to-join with the court." (*Hoffmann-La Roche, Inc. v. Sperling*, 493 U.S. 165 (1989)).

Although notices of preliminary settlements should arguably be given to putative class members in Rule 23 cases and in FLSA class actions in which class members have filed consents to join, notice of the Proposed Settlement herein is unnecessary. The parties have settled Mr. Hogarty's individual claims. The dismissal of the class action allegations herein will not

¹ Due to the confidential nature of the settlement, additional details are not provided herein. However, the parties submit that a review of the parties' respective ENE submissions would demonstrate the reasonableness of the Proposed Settlement.

adversely affect any potential class member's right to pursue his or her individual wage and hour claims. Moreover, notice of the Proposed Settlement is not necessary here because persons who have not filed consents have no standing to object to the Proposed Settlement in any event.

IV. CONCLUSION

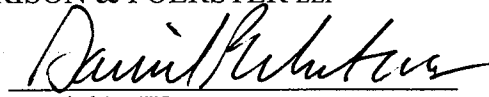
The Proposed Settlement is fair and reasonable, therefore the requested dismissal should be entered. Class notice is not required, as none of the class members are currently parties to this action. The Proposed Settlement has been reached in good faith after appropriate due diligence into the facts and the law, and is jointly submitted to the Court by all parties involved. The parties respectfully request that the Court approve the Proposed Settlement, and order that the Complaint be dismissed with prejudice.

Respectfully submitted,

Dated: August 11, 2008

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